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NO. 83-5965

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

MICHAEL WAYNE EVANS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD CONSIDER GROUNDS NOT PRESENTED TO THE COURT BELOW?

II. WHETHER THE STATE SYSTEMATICALLY EXCLUDED BLACKS, MEXICAN-AMERICANS AND PERSONS BETWEEN THE AGES OF EIGHTEEN AND TWENTY-ONE FROM SERVING AS GRAND JURY COMMISSIONERS?

III. WHETHER THE STATE SYSTEMATICALLY EXCLUDED BLACKS FROM SERVING ON THE GRAND JURY?

IV. WHETHER THE TRIAL COURT ERRED IN REFUSING TO PERMIT PETITIONER TO IMPEACH HIS OWN WITNESS WITH EVIDENCE OF BAD CHARACTER?

V. WHETHER THE TRIAL COURT'S DENIAL OF PETITIONER'S REQUEST AT THE PUNISHMENT PHASE TO PUT INTO EVIDENCE THE FACT THAT PETITIONER WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT IN A SEPARATE CAPITAL MURDER CHARGE PRECLUDED PETITIONER FROM PRESENTING MITIGATING EVIDENCE?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the court of Criminal Appeals of Texas, which is reported at 656 S.W.2d 65 (Tex.Crim.App. 1983)(en banc), is reproduced in Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for leave to file Petitioner's Motion for Rehearing without written order on September 21, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on August 22, 1977, in Dallas County, Texas, for the murder of Elvira Guerrero, while in the course of committing and attempting to commit the offense of robbery. Petitioner was initially tried on October of 1977 in the 103rd Judicial District Court of Dallas County, Texas and was found guilty of the capital offense. His conviction was reversed by the Texas Court of Criminal Appeals on September 10, 1980, and the cause remanded for new trial.

Petitioner's new trial began on September 28, 1981, and on October 1, 1981, the jury found Petitioner guilty of the capital offense. On October 8, 1981, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death. Petitioner appealed this conviction and sentence to the Court of Criminal Appeals of Texas, which, on May 25, 1983, affirmed the conviction and sentence. Rehearing was denied on September 21, 1983.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's proportionality claim and his claim that the death penalty as applied discriminates on the basis of race because Petitioner has not presented the precise issues raised herein to the Texas Court of Criminal Appeals.

Petitioner's claims of intentional and systematic exclusion of Blacks, Mexican-Americans and persons between the ages of eighteen and twenty-one should be denied as only questions of evidence and factual findings are involved. The court below, correctly applying the test established by this Court in Castenada v. Partida, 430 U.S. 482 (1977), held that Petitioner failed to present sufficient evidence to demonstrate a prima facie case of underrepresentation.

Petitioner has failed to demonstrate a claim of constitutional dimension with his contentions that the trial court committed fundamental error in refusing to permit Petitioner to impeach his own witness with evidence of prior convictions. Texas law expressly excludes the use of bad character to impeach a party's own witness. Further, the facts and circumstances of the present case are significantly different than those presented to this Court in Chambers v. Mississippi, 410 U.S. 284 (1973).

Petitioner's claim that he was prevented from presenting mitigating evidence relevant to the special issues is wholly conclusory. The court below correctly held that Petitioner failed to demonstrate the exclusion of any relevant mitigating evidence at the punishment phase.

This Court had held that proportionality review is not constitutionally required in every death penalty case. In so doing, the Court expressly reaffirmed the Texas capital sentencing statute. Further, Petitioner's conclusory allegations fail to demonstrate any discrimination on the basis of race in the application of the death penalty in Texas.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S PROPORTIONALITY CLAIM AND HIS CLAIM THAT THE DEATH PENALTY AS APPLIED DISCRIMINATES ON ACCOUNT OF RACE BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court blow. E.g., Illinois v. Gates, 103 S.Ct. 2317, 2321-23 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and come to the conclusion that the Judiciary Act of 1789, 20, Section 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction

of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

Petitioner's contentions that the Texas death penalty scheme is constitutionally invalid because it fails to provide a procedures for proportionality review and that the death penalty as applied in Texas discriminates on the basis of race were not raised in the court below. Thus, Petitioner's claims were not adequately presented to and decided by the state court below. Respondent submits that in view of Petitioner's failure to sufficiently and properly raise the issues presented here below, the failure of the state court to pass on these issues, the desirability of giving the state the first opportunity to address the issues, the application for certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. at 439.

In any event, this Court held in Pulley v. Harris, 52 L.W. 414 (Jan. 23, 1984), that the comparative proportionality review is not constitutionally required in every case in which the death penalty is imposed and the defendant requests it. Further, Petitioner's allegations that the death penalty as applied in Texas discriminates on account of race because more Blacks and Hispanics are prosecuted and convicted of capital murder than are Caucasians are self-serving, conclusory and totally unsupported by any specific allegations.

III. REVIEW OF PETITIONER'S CLAIMS OF INTENTIONAL AND SYSTEMATIC EXCLUSION OF BLACKS, MEXICAN-AMERICANS, AND PERSONS BETWEEN THE AGES OF EIGHTEEN AND TWENTY-ONE SHOULD BE DENIED AS ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The questions presented for review relative to Petitioner's claims that Blacks, Mexican-Americans, and persons between the ages of eighteen and twenty-one were intentionally and systematically excluded from serving on grand juries and from

serving as grand jury commissioners do not present substantial questions worthy of this Court's review. In Castenada v. Partida, 430 U.S. 482, 494 (1977), this Court established the test by which to determine whether an equal protection violation has occurred in the context of grand jury selection:

> [I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.

(Citations omitted). Applying the Castenada test, the Texas Court of Criminal Appeals held that Petitioner failed to present sufficient evidence to prove underrepresentation. Evans v. State, 625 S.W.2d at 66. The issues presented involve nothing more than the state appellate court's application of well-established principles to a unique factual situation.

IV. PETITIONER'S CLAIM THAT THE TRIAL COURT ERRED IN REFUSING TO PERMIT PETITIONER TO IMPEACH HIS OWN WITNESS FAILS TO STATE A CLAIM OF CONSTITUTIONAL DIMENSION.

Petitioner contends that he was denied a fundamentally fair trial by the trial court's refusal at the guilt-innocence stage to permit defense counsel to impeach a defense witness by offering evidence of the witness' prior convictions. He argues that he had a right to such evidence under Texas law and that the court's refusal to permit such evidence violated the principles as established by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973). Petitioner's claims are wholly without merit.

The court below expressly found that proof of prior convictions is a form of impeachment by showing bad character. Texas law expressly excludes evidence of a witness' bad character for impeachment. Evans v. State, 625 S.W.2d at 66. See Tex. Code Crim. Proc. Ann. art. 38.28 (Vernon).

Further, the facts and circumstances of the present case are significantly different from those presented in Chambers. Chambers involved the exclusion of hearsay evidence critical to the accused's defense and bearing substantial assurance of trustworthiness. As Petitioner concedes in his petition, the evidence excluded by the trial court was useful "to establish or disestablish [sic] credibility" of the defense witness. Respondent submits that Petitioner's claim of constitutional error is meritless.

V. THE COURT BELOW CORRECTLY DETERMINED THAT PETITIONER WAS NOT PRECLUDED FROM PRESENTING RELEVANT MITIGATING EVIDENCE AT THE PUNISHMENT PHASE.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court held that the sentencer in a capital case must be permitted to consider any relevant mitigating factors. In so holding, however, this Court expressly noted that "nothing in [the court's] opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 605 n.12.

Following the Lockett guidelines, the court below held that Petitioner failed to demonstrate, other than by bare conclusion, that evidence of his conviction and life sentence for a separate and distinct murder, was relevant mitigating evidence. In so holding the court below stated:

> The next two grounds of error complain of exclusion of evidence of appellant's conviction and life sentence for another murder. He again argues the evidence was admissible under Art. 37.0171, supra, and quotes from the opinion in Jurek v. State,

> 522 S.W.2d 934, and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, to the effect that the jury can consider the range and severity of prior criminal conduct of the accused and should have all relevant information before it. The fact of conviction and the decision of another jury of the punishment appropriate for a different murder are not evidence of appellant's conduct. If the conviction and punishment had occurred prior to the instant offense, they would be relevant to show a lack of rehabilitation, but that is not the situation here. Although appellant makes the assertion that this evidence "was relevant on all 3 [punishment stage] issues," he gives no reasons to illustrate this bare conclusion. We perceive no relevance under the facts of this case and overrule the grounds of error.

Evans v. State, 625 S.W.2d at 67.

Petitioner again presents nothing more than his bare conclusion that the evidence "was relevant to all three (3) [punishment] issues." His claim that he was precluded from presenting relevant mitigating evidence is thus, not worthy of this Court's review. Compare, Eddings v. Oklahoma, 455 U.S. 104 (1982).

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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